

FILED
COURT OF APPEALS
DIVISION II

2014 DEC 17 PM 1:16

STATE OF WASHINGTON

BY  DEPUTY

NO. 46549-3-II

**COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION II**

VALERIE AND STEVEN ANDERSON,

Appellant,

v.

MASON COUNTY,

Respondent.

APPELLANT'S BRIEF

**Appeal from the Superior Court
Of Mason County, Washington
The Honorable Toni Sheldon**

**RONALD D. NESS
Attorney for Appellant
420 Cline Avenue
Port Orchard, WA 98366
Telephone: (360) 895-2042**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	i
INTRODUCTION.....	1
ASSIGNMENTS OF ERROR.....	1
ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT	6
CONCLUSION.....	12

TABLE OF AUTHORITIES

Cases

<i>1000 Virginia Limited Partnership v. Vertecs Corporation v. JTE Construction, Inc.</i> , 158 Wash.2d 566, 146 P.3d 423.....	8
<i>American States Insurance Company v. Symes of Silverdale, Inc.</i> , 150 Wash.2d 462, 78 P.3d 1266 (November 2003).....	7
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wash.2d 215, 219, 543 P.2d 338 (1975).....	8
<i>Hudesman v. Meriwether Leachman Associates, Inc.</i> , 35 Wash.App. 318, 666 P.2d 937 (1983).....	8
<i>Lybecker v. United Pac. Ins. Co.</i> , 67 Wash.2d 11, 15, 406 P.2d 945 (1965).....	8
<i>Mutual of Enumclaw Insurance Company v. USF Insurance Company</i> , 137 Wash.App. 352, 153 P.3d 877 (February 2007).....	7
<i>Young v. Seattle</i> , 30 Wash.2d 357, 191 P.2d 273 (1948).....	8

Statutes

RCW 4.16.310.....	1, 6, 7, 9, 10
RCW 4.16.300.....	10
RCW 4.16.320.....	10

I. Introduction

This is an appeal from the court granting defendant, Mason County's, motion for summary judgment.

II. Assignment of Error

1. The Court erred in granting the summary judgment motion of defendant, Mason County.

III. Issues pertaining to Assignment of Error

1. The Court erred when it granted defendant, Mason County's, motion for summary judgment and relied on the statute of repose RCW 4.16.310. The Court erred when it did not consider the repair work done by Mason County as the beginning date as relating to the statute of repose.

IV. Statement of the Case

Allyn View Mobile Home Park is a mobile home park located in Allyn, Washington and is owned and managed by Barbara Bradshaw. CP 27. At some point in late 1999 or 2000, Mason County required Allyn View to convert their septic system to a sewer system maintained by Mason County. Much of the excavation and conversion work done on Allyn View

septic system was done adjacent to Lot 41, where Plaintiff's Steven and Valerie Anderson now live. The work was completed in 2001. CP 160.

Much of the excavation and conversion work done on the Allyn View septic system was done adjacent to Lot 41, where the Plaintiff's Steve and Valerie Anderson now live. CP 60, para 4. The work was completed in 2000. Prior to the required conversion from the septic system to the sewer system, no sinkholes had ever developed at Allyn View. CP 61, para 5.

In January of 2010 a sinkhole developed on Lot 41 where the Plaintiff's live. CP 61. The Plaintiff's reported the sinkhole to Robin Kiser, an onsite manager at Allyn View. CP 61. Robin Kiser then reported the sinkhole to Mason County. *Id.* Bradshaw followed up that telephonic report with a written "Mason County Claim for Damages Form" that described the sinkhole, as well as the representations from a Mason County employee that the sinkholes had developed as a result of improperly capped septic tanks. On the form, Bradshaw wrote

that “Earth has given way, causing a large sink hole. FYI- this is a safety concern.” CP 61.

In February 2010, a Mason County employee came to Allyn View and filled in the exposed sinkhole. CP 61. Based on the testimony from Mason County employees Tom Moore and Jeff Palmer on April 2, 2014, it is believed that Mason County employee Bill VanBuskirk filled the sinkhole in. CP 166. Based on the same testimony, it is believed that the sinkhole was filled in on February 14th, 2010 using 1.32 tons of pea gravel and .50 yards of top soil. *Id.* Based on the same testimony, Mason County maintains schematic maps of the locations of subterranean septic tanks, and those maps are located within Mason County work trucks. *Id.* Mason County employees therefore knew of the relative location of the septic tanks adjacent to the Plaintiff’s house. *Id.*

Over the next year, Bradshaw and her employees continually contacted Mason County in an attempt to get them to investigate the decommissioned septic tanks at Allyn View. CP 61.

On March 24th, 2010 Theresa Janzen, the General Manager of Allyn View at the time, received a phone call from Mason County employee Emmett Dobey in which he represented that Mason County would be responsible for any residual damage that developed as a result of the improperly decommissioned septic tanks. CP 61.

Over the next several months, Bradshaw and her staff continued to contact Mason County to implore them to act. CP 61. Bradshaw and her staff wrote at least three letters to Mason County (May 10th, 2010, September 3rd, 2010 and November 26th, 2010) articulating their concern about the decommissioned septic tanks. *Id.* Mason County did nothing to address the decommissioned septic tanks at Allyn View during this time. *Id.* On December 28th, 2010 Mason County Commissioner Lynda Erickson acknowledged the correspondence from Allyn View and represented that she was working to remedy the issue. CP 62.

Despite Bradshaw's frequent warnings and requests for action from Mason County, no action was taken by Mason

County to investigate or repair the issues they had been made aware of between February 2010 and when the Plaintiff's fall occurred in February of 2011. CP 62.

On February 4, 2011 Plaintiff, Valerie Anderson, was taking a walk outside starting from her house, to the street she lived on, to the post office and back to the Allyn View Mobile Home Park. She was walking on the side lawn beside the shed. On her way back to the porch she fell in a deep hole beside their shed. CP 168. This fall is the subject of this lawsuit.

In 2011, after Mrs. Anderson's fall into the sink hole, Mason County began the process of excavating the previously decommissioned septic tanks at Allyn View. According to Thomas Moore, employee of Mason County, who is the deputy director of utilities, Mason County, (CP 170), after being advised of the incident with Mrs. Anderson, decided to remedy the situation and decided to go ahead and re-fill the holes that had appeared in the Allyn View Mobile Home Park. CP 120 Jeff Palmer, who was involved in the excavation work at Allyn View Park indicated that he himself, Bill VanBuskirk and

employee Garret Ogg excavated the material that was inside the septic tanks and the tanks were partially empty. The material that was down there at the time was sand. He did not see any caps around the tanks. CP 175.

V. Summary of Argument

Defendant, Mason County, moved for summary judgment based on the statute of repose, RCW 4.16.310. Appellant submits that the statute of repose has not been violated here as the cause of action did not accrue until the Plaintiff, Valerie Anderson, fell in the hole next to her property. Additionally, RCW 4.16.310 refers to claims arising from repairs in addition to construction, alteration, repair, design, planning, survey, engineering of improvements upon real property.

VI. Argument

STANDARD OF REVIEW

1. “The standard of review of an order of summary judgment is de novo, and the appellate court performs the same

inquiry as the trial court.” *American States Insurance Company v. Symes of Silverdale, Inc.*, 150 Wash.2d 462, 78 P.3d 1266 (November 2003). *Mutual of Enumclaw Insurance Company v. USF Insurance Company*, 137 Wash.App. 352, 153 P.3d 877 (February 2007) further states “Summary judgment orders are reviewed de novo and are proper if, after reviewing all the documents on file, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. All facts and inferences are viewed in a light most favorable to the nonmoving party. Summary judgment is proper when reasonable persons could only reach the conclusion that the nonmoving party is unable to establish any facts that would support an essential element of its claim.”. Page 358, 359.

A.

The statute of repose does not apply because the statute of repose has not expired. RCW 4.16.310 is a statute of repose that generally terminates an action arising out of the construction, alteration or repair of an improvement to real property if the action has not accrued within six years.

However, Washington Courts apply the discovery rule in cases where the factual basis for the incident is something the Plaintiff would not know or have reason to know about.

Usually, a cause of action accrues when the party has the right to apply to a court for relief. 1000 Virginia Limited Partnership v. Vertecs Corporation v. JTE Construction, Inc., 158 Wash.2d 566, 146 P.3d 423. Gazija v. Nicholas Jerns Co., 86 Wash.2d 215, 219, 543 P.2d 338 (1975); Lybecker v. United Pac. Ins. Co., 67 Wash.2d 11, 15, 406 P.2d 945 (1965) A cause of action accrues at the moment when a suit may be maintained against the wrongdoer, at the time damage is sustained or when the injured party first has a presently enforceable demand, and is entitled to sue. Young v. Seattle, 30 Wash.2d 357, 191 P.2d 273 (1948). As stated in Gazija v. Nicholas Jerns Co., supra 86 Wash.2d at 219-21, 543 P.2d 338: In most circumstances a cause of action accrues when its holder has the right to apply to a court for relief.... Until a plaintiff suffers appreciable harm as a consequence of negligence, he cannot establish a cause of action. Hudesman v. Meriwether Leachman Associates, Inc., 35

Wash.App. 318, 666 P.2d 937 (1983). In this case there was no harm suffered to the Plaintiff until she fell into a sink hole caused by an uncapped septic tank on February 4, 2011. The Anderson's action did not accrue until the incident on February 4, 2011. The improperly filled septic tanks were not apparent to her or anyone else because it was buried beneath several feet of top soil and was invisible to the naked eye.

Therefore, when Plaintiff filed the Complaint on February 7, 2013 she was within both the three year statute of limitations for a claim and had not exceeded the six year time period enumerated by RCW 4.16.310, the statute of repose.

B.

In the alternative, Defendant Mason County's motion for summary judgment should be denied because Mason County conducted repair work in 2010.

If the court finds that the discovery rule does not apply to the accrual date of this action, the court should apply the initial accrual date of the statute of repose to the date when Mason

County completed their initial repair of the first sinkhole in February of 2010.

RCW 4.16.310 applies to both new construction, as well as to alteration and repair. In pertinent part, the statute reads:

RCW 4.16.310. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property – Accrual and limitations of actions or claims. All claims or causes of action as set forth in RCW 4.16.300 shall accrue... (Emphasis added.)

RCW 4.16.310 references RCW 4.16.300, which provides a list of types of activity that also fall under the purview of the statute of repose. To wit:

RCW 4.16.300. Actions or claims arising from construction, alteration, *repair*, design, planning, survey, engineering, etc., of improvements upon real property. RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or *repaired any improvement upon real property*, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.... (Emphasis added.)

Here, Mason County dispatched personnel to Allyn View in February of 2010 to fill in and repair the initial two sinkholes that had developed near the Plaintiff's carport. It was clear to the Mason County employee there that the February 2010 sinkholes were associated with the prior septic tank decommissioning and conversion. CP 61, para 9. Records exist that reflect that Mason County ordered and picked up 1.32 tons of Pea Gravel and .50 yards of top soil from Peninsula Top Soil in February 2010 for a job described as "Material to Fill in Sinkhole @ Mobile Home Park in Allyn." CP 61, para 3.

In addition, in discovery responses, Mason County admitted to ordering the product and performing repairs (CP 104):

INTERROGATORY NO. 19: Provide the name, address, phone number and primary point of contact for any contractor employed by Mason County that conducted any work on behalf of, or at the direction of, Mason County in the location of the **INCIDENT** in 2010.

ANSWER: No contractor was employed. Tom Moore ordered the product used to fill the hole, not sure who at the County filled the holes.

INTERROGATORY NO. 23: If Mason County or any assigned contractors or subcontractors took any action to address any sinkholes, depressions or indentations in the location of the **INCIDENT** February 2010 or February 2011, describe what materials were used.

ANSWER: 2010- Pea Gravel and top soil; 2011- (controlled density fill). *Id.*

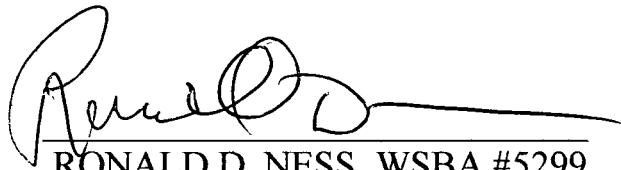
The statute of repose applies to repairs as well as “substantial completion of construction.” If the court finds that the discovery rule of accrual does not apply, the repair work that Mason County conducted at Allyn View as the inception date upon which the statutes of limitation and repose should be based. During their repair work in February of 2010, Mason County was aware that the two holes they were filling were a part of a larger and connected septic tank field. They were aware of this because they had schematic maps that showed the location of the septic tanks from the prior septic tank conversion. CP 166.

VII. Conclusion

This Court should consider all of the pleadings filed by both parties in this matter and make a determination, based on

those pleadings, whether summary judgment was the appropriate remedy under the facts. Summary judgment was not an appropriate remedy because Plaintiff complied with all of the requirements of the statute and the case law.

Respectfully Submitted this 15 day of Dec, 2014.

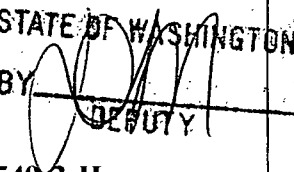

RONALD D. NESS, WSBA #5299
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II

2014 DEC 17 PM 1:16

STATE OF WASHINGTON

BY  DEPUTY

VALERIE ANDERSON and STEVEN,
B. ANDERSON, husband and wife and
the marital community thereof,

Plaintiff,

v.

MASON COUNTY,

Defendant.

Case No.: 13-2-00095-8

Court of Appeals No.: 46549-3-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

COUNTY OF KITSAP)

The undersigned, being first duly sworn on oath, deposes and states:

That on the 16th day of December, 2014, affiant filed with the Court of Appeals, Division II and deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

John Edward Justice
Law Lyman Daniel Kammerrer et al
P.O. Box 11880
Olympia, WA 98508-1880

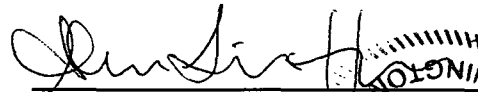
Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Containing a copy of the Appellant's Brief.


TRICIA BOYES

1
2
3 SUBSCRIBED AND SWORN to before me this 16th day of December, 2014.
4
5

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32


NOTARY PUBLIC in and for the
State of Washington, My
Commission Expires: 11/29/15

